STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
AND OAKLAND COUNTY CIRCUIT COURT

RANDY H. BERNSTEIN, DPM,

Plaintiff-Appellee

v

SEYBURN, KAHN, GINN, BESS AND SERLIN, PROFESSIONAL CORPORATION, a Michigan professional corporation, and BARRY R. BESS, individually,

Defendants-Appellants

SCt No. 149032
LC No. 08-096538-NM
COA No. 313894

REPLY BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS SEYBURN, KAHN, GINN, BESS & SERLIN, P.C. AND BARRY R. BESS

THOMAS, DeGROOD & WITENOFF, P.C.
By: Michelle A. Thomas (P35135)
Attorneys for Defendants-Appellants
400 Galleria Officentre, Suite 550
Southfield, MI 48034
248-353-4450
mthomas@thomasdegrood.com

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Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

TABLE OF CONTENTS

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

INDEX OF AUTHORITIES

Court Rules

Thomas DeGrood & Witenoff
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Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

Statutes

Miscellaneous

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

REPLY ARGUMENTS:

I. *MCL 600.5805(6)* AND *MCL 600.5838(1)* REQUIRE, WITHOUT EXCEPTION, THAT MALPRACTICE CLAIMS BE FILED WITHIN TWO YEARS OF THE DATE OF SPECIFIC PROFESSIONAL SERVICES OUT OF WHICH THE CLAIMS ARISE

Bernstein contends that, when amending *MCL 600.5838*[1] and enacting *MCL 600.5838a*[2] in 1986, the Michigan Legislature intentionally abrogated the "last treatment or service" rule for medical malpractice actions, only, and, hence, signaled its acquiescence to continued broad judicial application of the rule in nonmedical claims. Bernstein also contends that *MCL 600.5838b,* which imposes a six year repose period on legal malpractice actions effective 1/2/13, reflects legislative acceptance of the fact that, for legal malpractice actions filed prior to 1/2/13, the "continuous generalized relationship" rule permits pursuit of undeniably stale claims.

Plaintiff's legislative analysis is unsound.

First, this Court has firmly rejected the doctrine of legislative acquiescence as a tool for statutory construction. *Nawrocki v Macomb Co Rd Comm'n,* 463 Mich 143, 177-178, n 33; 615 NW2d 702 (2000); *Robinson v City of Detroit,* 462 Mich 439, 465 n 25; 613 NW2d 307 (2000). See also: *Rowland v Washtenaw Co Rd Comm'n,* 477 Mich 197, 209, fn 8; 731 NW2d 41 (2007), and cases cited within.

Second, the statutory accrual language at issue belies Plaintiff's "spin" on the Michigan Legislature's presumed intentions. Specifically, both *§5838a(1)* and *§5838(1)* expressly tie accrual to the date of the professional services out of which the malpractice claims arise. Given the identical focus upon the date of professional service out of which the malpractice allegedly arises, the slight variations in

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[1] "Sec. 5838. **(1)** Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." (emphasis supplied)

[2] "Sec. 5838a. **(1)** For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

verbiage seized upon by Plaintiff amounts to a distinction without of difference. More to the point, the Legislature's utilization of the nearly identical modifying phrases, "out of which the claim for malpractice arose" and "that is the basis of the claim of ...malpractice" plainly indicates an awareness that, while professional relationships often involve numerous services provided over an extended period of time, malpractice claims necessarily focus upon **specific** acts or omissions and, therefore, malpractice claims may and will accrue within the total length of a given professional relationship.

In other words, proper construction of *§5838(1),* with every word given meaning, requires the conclusion that the date of last general professional service is legally irrelevant unless that date is also the date out of which the **particular** malpractice claims arise. *Priority Health v Comm'r of the Office of Fin & Ins Services,* 489 Mich 67, 77; 803 NW2d 132 (2011); *In Re MCI Telecom Compl,* 460 Mich 396, 414; 596 NW2d 164 (1999); *Booth Newspapers v U of M Bd of Regents,* 444 Mich 211, 228; 507 NW2d 422 (1993); *Baker v GM Corp,* 409 Mich 639, 665; 297 NW2d 387 (1980).

Additionally, the enactment of *MCL 600.5838a* was just part of the comprehensive medical malpractice tort reform adopted by the Michigan Legislature[3]. *Solowy v Oakwood Hosp Corp,* 454 Mich 214, 219-229; 561 NW2d 843 (1997). The fact that the Michigan Legislature affirmatively responded to concerted lobbying, on behalf of health professionals, by adding specific restrictions upon medical malpractice actions, cannot be elevated to or equated with tacit legislature approval of overly broad judicial application of the "continuous generalized relationship" rule in non-medical malpractice actions.

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the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." (emphasis supplied)

[3] See, i.e.: *MCL 600.1483* (noneconomic damages cap); *MCL 600.2169* (more stringent standards for qualification of experts); *MCL 600.6304(6)(a)* (retaining joint and several liability in medical malpractice cases where the plaintiff is deemed to be without fault); *MCL 600.2912a* (heightened burden of proof/lost opportunity claims); *MCL 600.2912b* (mandatory notice of intent/responses/access to medical records); *MCL 600.2912c* (affidavit of non-involvement/reinstatement); *MCL 600.2912d* (affidavit of merit/access to medical records); *MCL 600.2912e* (affidavit of meritorious defense/access to medical records); *MCL 600.2912f* (wavier of physician-patient privilege); *MCL 600.2912g* (voluntary arbitration of claims less than $75,000.00); *MCL 600.2912g* (copies of settlement agreements to be filed with Department of Commerce); *MCL 600.5856(c)* (tolling effect of notices of intent). See also: *Velez v Tuma,* 492 Mich 1, 12-13; 821 NW2d 432 (2012); *Cox v D'Addario,* 225 Mich App 113, 121; 570 NW2d 284 (1997).

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

Similarly, the legislature's enactment of *MCL 600.5838b*[4] cannot be elevated to or equated with legislature acquiescence to the pursuit of and recovery under legal malpractice claims filed more than two years after the date of last professional service out of which the claims arise. Both the express language of *MCL 600.5838b(1)* and its legislative history (*Senate Fiscal Analysis, 9/24/12*[5] and *Legislative Analysis, 12/13/12*[6]) indicate that the Legislature intended to provide a repose period for legal malpractice claims that

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[4] "Sec. 5838b. (1) An action for legal malpractice against an attorney-at-law or a law firm shall not be commenced after whichever of the following is earlier:

(a) The expiration of the applicable period of limitations under this chapter.
(b) Six years after the date of the act or omission that is the basis for the claim.

(2) A legal malpractice action that is not commenced within the time prescribed by subsection (1) is barred."

[5] "The bill would add Section 5838b to the Revised Judicature Act to provide that an action for legal malpractice against an attorney-at-law, licensed in Michigan or elsewhere, or a law firm could not be commenced later than six years after the date of the act or omission that was the basis for the claim.

The Act provides that a person may not being an action to recover damages unless, after the claim first accrued to the person, the action is commenced within the period of time prescribed by the Act (the statute or period of limitations). As a rule, the statute of limitations on malpractice actions is two years.

Except as otherwise provided in Section 5838a (which applies to medical malpractice actions), if a claim is based on the malpractice of a person who is a member of a State licensed profession, the claim accrues at the time the person discontinues serving the plaintiff in a professional capacity as to the matters that were the basis for the malpractice action, regardless of when the plaintiff discovers or otherwise has knowledge of the claim." (emphasis supplied)

[6] "The bill would create a period of repose for bringing a claim of malpractice against an attorney-at-law or a law firm.

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The statutes of limitation establish time frames for bringing an action to recover damages for injuries to persons or property. In a claim of malpractice against a person who is a state-licensed professional, except as otherwise provided in Section 5838a (medical malpractice), an individual has two years from the date the claim accrues or six months after discovery of the facts giving rise to the claim, whichever is later, in which to file. (In the kind of case addressed by this bill, a claim accrues at the time the professional stops serving the plaintiff in a professional capacity as to the matters that were the basis of the claim).

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Some feel that a period of repose should also be provided for attorneys and law firms. Without a period of repose, attorneys remain at risk for malpractice actions even well into retirement. As such, they must continue to incur expense into retirement to maintain "tail" insurance, a form of liability insurance to protect themselves from malpractice claims arising from work they performed before retirement. Similar to statutes of limitation, periods of repose limit the time frame in which a lawsuit can be filed and so recognize that as time goes on, memories fade, evidence and records are lost or destroyed, and witnesses may be deceased. Legislation has been offered at the initiation of the Probate and Estate Planning Section of the State Bar of Michigan.

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The bill would amend the Revised Judicature Act to create a six-year statute of repose for claims against lawyers and law firms. Specifically, the bill would prohibit an action for legal malpractice against an attorney-at-law or a law firm from being commenced after the expiration of the applicable period of limitations under Chapter 58 or six years after the date of the act or omission that is the basis for the claim, whichever was earlier. Thus, no lawsuit could be brought for legal malpractice later than six years after the act or omission that was the basis for the claim." (emphasis supplied in underline)

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

compliments the two year limitation period. Specifically, *§5838(1)* and *§5838b* are both explicitly triggered by the last service out of which the malpractice claims arise. Thus, the enactment of *MCL 600.5838b* reinforces the conclusion that the Michigan Legislature never intended the Michigan Courts to superimpose a broad "continuous generalized relationship" extension upon the two year malpractice accrual period set forth in *MCL 600.5838(1)*. Indeed, the legislative history of *§5838b* reveals that the Michigan Legislature acted at the behest of the Probate and Estate Planning Section of the Michigan State Bar to protect retired attorneys from the costs and risks associated with stale claims. *Legislative Analysis, 12/13/12, supra.*

The bottom line: proper judicial construction of *MCL 600.5838(1)* requires, without exception, that legal malpractice claims filed before 1/2/13 be filed within two years of the date of specific professional services out of which the claims arise.

II. THE DEFENDANTS DID NOT PROVIDE CONTINUOUS GENERALIZED PROFESSIONAL SERVICES TO BERNSTEIN, AS CORPORATE SHAREHOLDER, AND BERNSTEIN'S MALPRACTICE CLAIMS ARISE OUT OF SEPARATE AND DISCRETE SERVICES PROVIDED TO CORPORATE CLIENTS

Bernstein insists that, between 1991 and 2006, there was a mutual "air of trust" between him, as corporate shareholder, and the Defendant corporate counsel, so as to forestall accrual of legal malpractice claims until Bernstein terminated the attorney-client relationship by terminating his shareholder relationship with FAHC. However, in direct derogation of *MCR 7.306(A)* and *MCR 7.212(D)(3)(b)*, Bernstein's Appellee's Brief contains no citations to the record for this factual assertion.

Alternatively, citing *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich App 509; 309 NW2d 645 (1981), *Yatooma v Zousmer*, 2012 Mich App LEXIS 962 (No. 302591, 5/15/12), *Neuffer v Pelavin & Powers, PC*, 2001 Mich App LEXIS 2478 (No. 219630, 10/26/01), and *Nugent v Weed*, 183 Mich App 791; 455 NW2d 409 (1990), Bernstein contends that, as general counsel for FHC, FAHC, and Sunset Blvd, the Defendants necessarily provided continuous legal services through 2006 to corporate shareholder Bernstein. Bernstein's evidence of such an attorney-client relationship: Bernstein's subjective

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

belief that the Defendant corporate attorneys also represented his personal interests as shareholder; the 4/28/06 letter directed to Bernstein by the Defendants following Bernstein's decision to terminate his relationship with FAHC and tender back his shares; and, the 7/3/06 letter directed by attorney Gross on behalf of Bernstein in response to the Defendants' 4/28/06 missive.

Yet, a review of the cases cited by Plaintiff and the entire record reveals that no generalized and continuous attorney-client relationship existed between the Defendants and Bernstein for the purposes of applying *§5838(1)* to the legal malpractice claims at issue.

First, it is well-established that the existence of an attorney-client relationship is dependent upon "the relations and **mutual** understanding of the parties." *Case v Ranney,* 174 Mich 673, 682; 140 NW 943 (1913). See also: *Macomb Co Taxpayers' Ass'n v L'anse Creuse Pub Schools,* 455 Mich 1, 11; 564 NW2d 457 (1997) [must be evidence that legal services were directly sought and provided]; *Fletcher v Bd of Education,* 323 Mich 343, 348; 35 NW2d 177 (1948) [attorney-client relationship grounded in contract and unilateral belief insufficient to create relationship].

Second, the cases cited by Bernstein do not support the notion that a separate attorney-client relationship existed between the Defendant corporate counsel and shareholder Bernstein. The *Fassihi* Court actually held that an attorney for a corporation does not automatically or ordinarily have an attorney-client relationship with shareholders and determined that no attorney-client relationship existed between the defendant counsel for a closely held corporation and the plaintiff shareholder. *Id at 514-515.* In *Yatooma,* the plaintiff did not assert legal malpractice claims premised upon an alleged attorney-client relationship between himself, as shareholder in a closely held corporation and general corporate counsel. In *Neuffer, supra,* the Court of Appeals reversed summary dismissal of legal malpractice against corporate counsel arising out of allegedly mishandled corporate debts, defaults and bankruptcy proceedings, holding that the plaintiff corporate shareholders had perfected the requisite element of an actionable attorney-client relationship with allegations that: corporate counsel had provided plaintiffs with individualized legal advice

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

regarding their purchase of corporate stock; corporate counsel had negotiated on behalf of the individual plaintiff shareholders with third party creditors; corporate counsel had represented the shareholders' interests in bankruptcy proceedings; and corporate counsel had appeared on behalf of the individual shareholders in an appeal of an order awarding the shareholders' stock to a corporate creditor. *Id at *3.* The *Neuffer* Court also highlighted the fact that the defendant attorneys did not submit any evidence establishing that they represented the corporation, only. *Id.*

In *Nugent* it was undisputed that: the plaintiff directly retained attorney Weed in 1971 to represent plaintiff and his corporations in various legal and investment affairs; Weed provided legal services in an individual capacity before incorporating his law practice in 1977; Weed and the PC constantly represented Nugent and his corporations until 1984, when Nugent terminated the relationship on the basis that the defendants had continuously provided improper financial advice; and, Nugent's complaint was filed in 1986. *Id at 792-793.* The Circuit Court determined the malpractice claims were time-barred because the attorney had ceased providing professional services in an individual capacity in 1977. *Id at 794.* The Court of Appeals reversed on the basis that: as a matter of law, the individual attorney remained personally liable for malpractice committed by the PC; the individual attorney, both as a solo practitioner and as the sole shareholder in his PC, continuously represented Nugent and his corporations as to the matters out of which the malpractice claims arose; and, the only change in the parties' relationship was the legal form of the defendant attorney's practice, a fact that was irrelevant to the application of *§5838(1). Id at 795-796.*

Unlike *Nugent* and *Neuffer,* the record here, including Bernstein's admissions, confirms that the Defendant corporate attorneys for FHC, FAHC, and Sunset Blvd did not provide shareholder Bernstein with individualized and continuous legal services through April of 2006. Specifically, Bernstein admits that,

- when he first entered into contract negotiations with Poss to temporarily serve as the corporate shareholder and officer in FHC, the Defendants represented Poss, only, with Bernstein

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

represented by his own attorneys, Ken Gross and Chuck Holzman (Apx 95a, 102a-106a, 111a, 145a);

- via a separate management corporation in which Bernstein had no interest, **Poss** hired the Defendants to serve as **FHC's corporate counsel** (Apx 58a, 60a, 70a, 72a, 94a-95a, 177a, 145a);
- the incorporation and management of FHC was directed solely by Poss, including **all** interactions with FHC corporate counsel and, specifically, between 1991and 1998 Bernstein did not offer any directions or instructions to the Defendants regarding the legal affairs of FHC (Apx 58a-60a, 70a-72a, 94a,117a);
- the incorporation and management of FAHC was directed solely by Poss, including **all** interactions with the Defendants who had been hired as corporate counsel (Apx 59a-60a, 70a-72a, 145a);
- the Defendants separately provided legal services to Bernstein, individually, but only as to matters of estate planning (Apx 95a, 144a-145a); and,
- Bernstein relied upon attorney Gross to ascertain and protect Bernstein's shareholder interests (Apx 73a, 120a. See also: 7/3/06 letter from Gross to Defendant Bess, Apx 71b-73b).

The contents of the 4/28/06 letter (Apx 55a-56a) plainly reveal that it had been prepared on behalf of FAHC to insure that Bernstein's future actions were not contrary to FAHC's best interests. This fact is confirmed by the very first paragraph of the 7/3/06 reply letter (Apx 71b-73b) where Bernstein's attorney, Ken Gross acknowledges that the Defendant Bess is/was acting as legal counsel for FAHC.

In short, the undisputed evidence is that the Defendants' attorney-client relationship was with the three distinct corporate entities formed and managed by Poss, with all legal services provided on behalf of the corporations and no individualized legal services provided to Bernstein as corporate shareholder. Hence, even if Michigan law recognizes a broadly applied "continuous generalized relationship" exception to the two year accrual period set forth in *§5838(1),* there is no evidence supporting assertions that the Defendants provided continuous and general legal representation to Bernstein, as an individual

shareholder, until Bernstein terminated his shareholder status with FAHC in 2006, so as to justify postponement of the accrual dates for Bernstein's malpractice claims arising out of specific legal services provided, respectively, to FHC in 1991 and 1999, to FAHC in 1998 and 2000, and to Sunset Blvd in 2002.

III. RETROACTIVE EFFECT SHOULD BE GIVEN TO A DECISION CLARIFYING THE CORRECT CONSTRUCTION AND APPLICATION OF *MCL 600.5805(6)* AND *MCL 600.5838(1)*

Bernstein maintains that *Morgan v Taylor,* 434 Mich 180; 451 NW2d 852 (1990) and *Levy v Martin,* 463 Mich 478; 620 NW2d 292 (2001) support broad application of a "continuous generalized relationship" rule that operates to delay accrual of legal malpractice claims until the termination of the entire attorney-client relationship. Bernstein is equally adamant that the principle of *stare decisis* precludes this Court from rejecting continued broad application of a "continuous generalized relationship" rule and, thus, overruling *Morgan* and *Levy.* Alternatively, Bernstein urges prospective effect for a final decision which disavows a broadly applied "continuous generalized relationship" rule, and/or, which overrules *Morgan* and *Levy.*

Once again, Bernstein proffers flawed legal analysis.

Stare decisis requires the Court to consider whether a prior decision was incorrectly decided and, if so, whether overruling the decision will cause excessive hardship due to existing reliance interests or expectations. *People v Tanner,* 496 Mich 199, 218, 250-253; 853 NW2d 653 (2014); *Joseph v Auto Club Ins Ass'n,* 491 Mich 200, 218-219; 815 NW2d 412 (2012); *Rowland,* 477 Mich at 214-216; *Robinson,* 462 Mich at 463-468. Reliance interests and expectations on the part of an injured party arise out of knowledge of a particular rule of law that has caused the party to conform his conduct to a certain norm before a triggering event. *Tanner,* 496 Mich at 252; *Rowland, supra; Robinson,* 462 Mich at 466-467. Recognizing that unambiguous statutory language serves as the exclusive guide for citizens' behavior, this Court applies a less deferential standard of *stare decisis* when re-examining precedent involving the judicial construction of legislation. *Tanner,* 496 Mich at 251; *Joseph,* 491 Mich at 219-200; *Trentadue v Gorton,* 479 Mich 378, 393-394; 738 NW2d 664 (2007); *Rowland,* 477 Mich at 214-219; *Nawrocki,* 462 Mich at 467-468.

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com

Specifically, this Court has historically recognized that it is duty bound to overrule prior decisions misconstruing or distorting unambiguous statutory language, reasoning:

- the Michigan Legislature serves as the people's duly elected representative;
- clear statutory language embodies and controls citizens' legitimate expectations and reliance interests with respect to the matters addressed in the legislation; and,
- the Michigan Courts are obligated to restore citizens' legitimate expectations and reliance interests by mandating statutory construction consistent with legislative intent.

Joseph, supra; Trentadue, supra; Rowland, supra; Nawrocki, supra; Robinson, supra.

Generally, the Supreme Court studiously avoids the extreme measure of prospective application, giving most opinions full retroactive effect. *Bezeau v Palace Sports & Entm't Inc,* 487 Mich 455, 462; 795 NW2d 797 (2010); *Rowland,* 477 Mich at 695; *Wayne Co v Hathcock,* 471 Mich 445, 484-485; 684 NW2d 765 (2004); *Pohutski v City of Allen Park,* 465 Mich 675, 695; 641 NW2d 219 (2002). Indeed, prospective relief is reserved for rare situations featuring exigent circumstances which may adversely impact the administration of justice; namely: the establishment of an entirely new rule of law via the overruling of long-standing and un-contradicted case law precedent upon which the general public has placed extensive reliance. *Bezeau,* 487 Mich at 462-463; *Rowland,* 477 Mich at 220-222; *Pohutski,* 465 Mich at 697; *Hyde v U of M Bd of Regents,* 426 Mich 223, 240; 393 NW2d 847 (1986). This Court routinely insists upon at least limited retroactive effect for decisions that settle conflicting cases and/or re-construe statutes, with the "new" decision applied to all cases commenced after the decision, as well as all pending cases in which the particular issue was preserved. *Rowland,* 477 Mich at 221-223; *Collins v Comerica Bank,* 469 Mich 1223; 668 NW2d 357 (2003); *Hyde,* 426 Mich at 237-241.

In this case, the doctrine of *stare decisis* certainly does not preclude the Court from resolving the existing conflict among Court of Appeals' opinions by clarifying that the expressly limited holdings in *Morgan* and *Levy* do not permit broad application of a "continuous generalized relationship" rule so as to

postpone accrual of legal malpractice claims until the termination of the entire attorney-client relationship. *Stare decisis* would also not prevent the Court from overruling *Morgan* and *Levy* to the extent that these prior decisions permit a judicially-imposed exception unsupported by the Michigan Legislature's unambiguous definition of accrual. *Tanner, supra; Joseph, supra; Trentadue, supra; Rowland, supra; Nawrocki, supra; Robinson, supra.* To paraphrase the *Trentadue* Court: given the clear language of *MCL 600.5838(1),* Bernstein could not have decided to postpone filing legal malpractice claims due to reliance upon the extra-statutory "continuous generalized relationship" rule; and, the only relevant expectations here are those of the Defendant attorneys to be free from the need to defend against long stale claims. *Id* at 393-394. *See also: Tanner, supra; Joseph, supra; Rowland, supra; Nawrocki, supra; Robinson, supra.*

Additionally, should the Court use this case to settle an existing conflict and/or to re-construe *§5838(1),* then the opinion should apply to: the named parties; all pending legal malpractice cases where the defendants preserved a statute of limitations defense; and, all actions commenced after the opinion is released. *Bezeau, supra; Rowland, supra; Pohutski, supra; Hathcock, supra; Collins, supra; Hyde, supra.*

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth in this Reply Brief, as well as those set forth in their Appellants' Brief, the Defendants respectfully request this Honorable Court to reverse the Court of Appeals' Opinion of February 26, 2014 and reinstate the November 29, 2012 Opinion and Order of the Circuit Court granting summary disposition of Plaintiff's Complaint pursuant to *MCR 2.116(C)(7).*

THOMAS, DeGROOD & WITENOFF, P.C

By: /s/ Michelle A. Thomas
Attorneys for Defendants-Appellants
400 Galleria Officentre, Suite 550
Southfield, MI 48034
(248) 353-4450
mthomas@thomasdegrood.com
P35135

Dated: April 2, 2015

Thomas DeGrood & Witenoff
400 Galleria Officentre, Suite 550, Southfield, MI 48034 Phone 248.353.4450 Fax 248.353.4451 www.thomasdegrood.com